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NSC FOR AHARRIMAN
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TAGS: KAWC MARR PTER PGOV PINS PREL AF

SUBJECT: DETAINEE LEGAL FRAMEWORK: GOA OFFICIALS OUTLINE
VIEWS ON SECURITY DETENTION DURING ADVANCE TEAM VISIT

REF: A. KABUL 01220
 IB. KABUL 01078
 IC. KABUL 00956
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 IG. KABUL 0369
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Classified By: Political-Military Affairs Counselor Carol A. Rodley; reasons 1.4(b) and (d)

¶1. (S/NF) Summary and Action Request: Please advise regarding Post's paragraph 9-13 suggestions on possible legal vehicles and next steps. Building on reftel efforts, Post has continued, ahead of and during the 1-3 May advance team visit of L/PM Attorney Adviser Eric Pelofsky and OSD Global Security Affairs Officer Anthony Ricci, to press the GOA to identify a legal mechanism for security detention of detainees to be transferred to the Afghan National Detention Facility (ANDF) from Guantanamo Bay (GTMO) and Bagram Theater Internment Facility (BTIF). Some options were identified during meetings with the Deputy National Security Adviser, Deputy Minister of Justice, and Detainee Review Board representatives. To prepare GOA interlocutors for future discussions with a high-level USG delegation, Post welcomes receipt of a revised non-paper on security detention as well as identification of specific cases for which security detention is likely required. End Summary.

Option for Security Detention Still Needed

¶2. (S/NF) While awaiting word from the Afghan Detainee Review Board (DRB) on the prosecutorial disposition of the first 12 detainees transferred to the Afghan National Detention Facility (ANDF) in April, Post has continued to press the GOA to identify a legal mechanism for security detention of other detainees who may be transferred to ANDF from Guantanamo Bay (GTMO) and Bagram Theater Internment Facility (BTIF) in the future. Citing President Bush's recent telephone conversation

with President Karzai on security detention, we have reiterated our concern that despite GOA assurances that all transferred cases can be handled via a prosecution model (reftel C), it may not be possible to meet the evidentiary burden for some cases of concern to both governments. Because there may sometimes be insufficient evidence or because the US may be unable to pass all evidence to the GOA due to intelligence sources/methods concerns, we have argued that security detention for the duration of the conflict remains a necessary option. We have noted that we understand an Afghan Presidential Directive is no longer a viable option for a legal mechanism.

¶13. (S/NF) Post and the L and OSD/GSA visitors have cited the May 2005 Joint Declaration of the United States-Afghanistan Strategic Partnership and the August 2005 Afghan diplomatic note on detainee transfers when stressing to GOA interlocutors the responsibility the GOA has accepted for "detention, investigation, and/or prosecution" of detainees returned to GOA custody and for taking "all steps necessary and appropriate under Afghan law and applicable international obligations" to prevent detainees from posing a continuing threat. As the L/PM representative outlined to the DRB, we see a need for four potential actions regarding enemy combatants during the present conflict: Killing on the battlefield, prosecution, security detention, and reconciliation.

ONSC, Detainee Review Board, Deputy Minister of Justice Views

¶14. (S/NF) At the Office of the National Security Council (ONSC) on May 2, Deputy National Security Adviser Engineer

Ibrahim Speenzada, Director of Internal Policy Abdullah Popal, and Director of External Affairs Sayeed Najeeb Tahmas met with the Deputy Chief of Mission, deputy polmilcouns, polmiloff, CSTC-A's Chief of Operational Law, L/PM's Attorney Adviser Eric Pelofsky, and OSD Global Security Affairs Officer Anthony Ricci. DSNA Ibrahim identified detainee issues as one of the GOA's highest priorities and stressed both the Information Operations (IO) value of returning detainees to GOA custody and the need to arrive at a mutually acceptable solution on security detention. Ibrahim discussed the "very painful pressure" ONSC experiences when officials are unable to tell families about the status of detainees and the likelihood that the lack of information on a detainee may prompt an entire family to sympathize with the enemy. External Affairs Director Tahmas emphasized the "big plus" to the GOA of having detainees in GOA custody. DNSA offered to exert any pressure needed to speed up processes related to detainees' return.

¶15. (S/NF) Later on May 2, a special meeting of DRB attended by the GOA and US participants listed at the end of paragraph six was convened; no Ministry of Justice (MOJ) representative attended. On April 30, Polmiloffs had briefed ONSC Director of Policy and Oversight Malik Quraishi on the need for this special DRB, which he pulled together on short notice and chaired. During more than two hours of discussion on how to handle detainees returned to GOA custody from GTMO and BTIF to ensure they do not threaten GOA or coalition forces for the duration of the conflict, GOA participants repeatedly reiterated their intention to prosecute. Ministry of Interior (MOI) representative General Jamaluddin emphasized that those involved not only in suicide bombings and terrorist activities but also in lesser offenses will be prosecuted. National Directorate of Security (NDS) Legal Adviser Rasoli said that the GOA can never detain indefinitely without prosecution and suggested a draft law on security detention be prepared for review by the National Assembly. Chief Judge of the Appellate Court for the Afghan National Army General BG Abdul Majeed Khawari said that if an individual threatens national sovereignty, he can be detained, but he must also be held responsible before a national security, military, or civil court.

¶6. (S/NF) An extensive, rapid-fire debate then erupted at a pace that could not be interpreted and was not summarized. Ministry of Defense (MOD) legal adviser Nezami then noted that the DRB had previously relayed its stance on the need to hold detainees responsible for crimes against internal and external security. Several attendees emphasized human rights concerns. Supreme Court Justice Barakzai stressed that the provisions of the law cannot be exceeded and that "whatever our losses, we must apply it." He said that Afghan law is quite different from international law and said the factor of individual rivalries must be taken into account when cases are investigated in order not to rely on possibly falsified information. In response to a US question on whether Karzai's authorities as Commander in Chief (CinC) allow him not only to order troops to kill but also to detain in order to avoid killing, Justice Barakzai responded that current law emphasizes the rights of the individual and that "we cannot hold innocent people for years." He observed that battlefield crimes would merit a maximum six-year sentence and observed, "wouldn't the war be over in six years?" Regarding CinC authorities, he stressed that while the president can order an attack to kill the enemy, he cannot order detention of the enemy because "we have prosecutors and others to deal with them."

GOA Attendees:

Director of Policy and Oversight, ONSC, Malik Quraishi
Director, External Affairs, ONSC, Mr. Sayeed Najeeb Tahmas

Supreme Court Justice Mohammed Barakzai (substituting for Justice Rashid)

Deputy Attorney General Shinwari

NDS Legal Advisor Rasoli

MOI Deputy Director of Intelligence General Jamaluddin

MOD Legal Advisor General Mohammed Yousef Nooristani

MOD Chief Judge of Appellate Court, Afghan National

Army General BG Abdul Majeed Khawari

MOD Legal Affairs Department Mr. Abdul Qayoum Nezami

US Attendees:

L/PM Attorney Adviser Eric Pelofsky

OSD Global Security Affairs Officer Anthony Ricci

CSTC-A Chief of Detainee Operations COL James Harrison

CSTC-A's Chief of Operational Law

Deputy polmilcouns and polmilooff

CSTC-A interpreter

¶7. (S/NF) Later on May 2, State and OSD visitors, CSTC-A's Chief of Operational Law, and polmil officers engaged Deputy Minister of Justice Dr. Mohammed Qasim Hashimzai in a 90-minute discussion on security detention options. When asked about CinC powers to order lethal force and detention, Hashimzai said that battlefield rules apply when lethal force is ordered but that when someone is captured, different rules apply. He noted Afghan lawyers are "stuck" since the Afghan Supreme Court has not ruled on security detention. He eventually suggested that the Supreme Court could possibly be asked for a judgment on a broader interpretation of CinC powers to allow security detention. Like Justice Barakzai, Dr. Hashimzai alluded to rivalries--as well as corruption--and emphasized the need for investigation to ensure the capture of a detained combatant had been legitimate. He conceded that it is logical to suggest that enemy combatants should be detained, but he argued that Afghan law does not allow that to be done without proceeding to investigate and prosecute. He was supportive of the option of passing a new law or regulation as outlined in paragraph ten below.

¶8. (S/SF) L/PM and OSD visitors instead met with the ICRC's Head of Delegation Reto Stocker on May 3 and reviewed in general terms our current approach to the GOA on the legal framework. Stocker noted ICRC cannot advocate for any given position.

Possible Vehicles for Legal Afghan Security Detention

¶9. (S/NF) DSNA Ibrahim has previously committed (per reftels C and D) to certifying that Afghan responses received to date on the six test cases judged prosecutable (reftel C) and the DRB's composition constitute a GOA response on a legal framework; his staff recently suggested Post provide a draft document for his signature. Post had previously asked that DNSA Ibrahim address security detention in this certification but is now refraining from pressing for this document pending further guidance from Washington on the desired vehicle to address security detention.

¶10. (S/NF) Post now sees the following three options, listed in order of feasibility/desirability, as possible vehicles for addressing security detention; counterarguments are in parentheses:

¶A. Guidelines signed by Defense Minister Wardak (Note any minister can be called before the National Assembly to answer for actions, and that Wardak, who has previously (reftel B), expressed reservations about MOD's role in regard to the ANDF, may not be willing to take this risk)

¶B. A Supreme Court ruling that CinC powers extend to security detention (Noting the May 2 comments by Supreme Court Justice Barbakzai, post views this as an option that may not have the desired result)

¶C. Amendments to the present draft Counterterrorism law or a draft new law to be introduced in the National Assembly (See reftel A on our view of the current parliamentary atmosphere)

Next Steps

¶11. (S/NF) L/PM is currently revising the early May unclassified nonpaper; we suggest the nonpaper include case

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citations documenting the US legal basis for security detention to aid Afghan understanding of our reasoning. If the high-level delegation visit remains on schedule for mid-May, we request the final version of the paper by our OOB on May 8 to allow adequate time for translation and quality checks.

¶12. (S/NF) Post also requests that ahead of a high-level delegation visit, the Department identify at least five specific BTIF and GTMO cases for which we believe security detention will be required. Post will relay some case data received from CJTF-82 via CSTC-A to the Department via e-mail for possible discussion/selection. We also request that L/PM obtain from OSD the case material (Secret/Releasable to USA, AFG) on all Afghan GTMO cases that we received here in hardcopy only (92 pages) and ensure that at least three cases are drawn from these. We suggest that our reviewing specific material with GOA may assist in their recognizing a need for security detention.

¶13. (S/NF) Post suggests that following receipt/translation of the nonpaper, we meet with DNSA Ibrahim to give him a readout of the advance team visit and to ask that he make good on his commitment to move us to a speedy resolution of the security detention issue. We believe we should suggest that an MOD vehicle could serve to extend President Karzai's CinC authority to include security detention. We suggest the USG provide suggestions on what should be included in an MOD vehicle addressing security detention during the present conflict. Finally, we suggest that if the MOD can be convinced, the Palace could, at an appropriately senior level, provide us with a letter or diplomatic note explaining that the MOD has issued guidelines for security detention and confirming that they and paragraph eight data constitute a collective GOA response on a detainee legal framework.

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